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No. 82-5119

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NELSON BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

# MEMORANDUM FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether a taking of money from a federally insured bank by false pretenses violates 18 U.S.C. 2113(b).

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MEMORANDUM FOR THE UNITED STATES

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## OPINION BELOW

The en banc opinion of the court of appeals (Pet. App. C) is reported at 678 F.2d 547. The panel opinion (Pet. App. A) is reported at 649 F.2d 281.

## JURISDICTION

The judgment of the en banc court of appeals was entered on June 1, 1982. The petition for a writ of certiorari was filed on July 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of taking money from a federally insured savings and loan

association in violation of 18 U.S.C. 2113(b) and was sentenced to a term of one year's imprisonment. A divided panel of the court of appeals reversed (Pet. App. A). The en banc court of appeals vacated the panel opinion and affirmed petitioner's conviction (Pet. App. C).

1. The evidence at trial is set out in the opinions below (Pet. App. A 5073; Pet. App. C 15226). Briefly, it established that on or about October 13, 1978, Lawrence and Elaine Rogovin mailed a $10,000 check from Cincinnati, Ohio, to their investment agent in Florida. The agent was to deposit the check into their savings account at the Dade Federal Savings and Loan Association. The check bore the limited endorsement on the back, "Deposit only to account of Lawrence and Elaine Rogovin," and gave their account number. The agent never received the check. A few days later, petitioner opened an account at a Dade Federal branch office, using a false address, birth date, and social security number. Later that day, at a different branch of the bank, petitioner deposited the Rogovins' $10,000 check into his new account, giving a second false address. The Rogovins' account number on the back of the check had been scratched out and petitioner's new account number had been substituted in its place. After a 20-day holding period, but before the Rogovins discovered what had happened to their check, petitioner withdrew the $10,000 in cash, with accrued interest, from his account, giving a third false address.

2. A divided panel of the court of appeals reversed petitioner's conviction (Pet. App. A 5072-5076). Although the court did not question the application of Section 2113(b) to theft by false pretenses (id. at 5073-5074), it held that the evidence was insufficient to prove that petitioner had a specific

intent to steal the $10,000 from the bank when he withdrew the funds (id. at 5074-5076).

The court of appeals granted rehearing en banc (Pet App. B), vacated the panel opinion, and affirmed petitioner's conviction (Pet. App. C 15225-15231). With respect to the question presented in the instant certiorari petition -- whether Section 2113(b) prohibits the obtaining of property from a bank by false pretenses -- the majority adopted the earlier holding of the Fifth Circuit in Thaggard v. United States, 354 F.2d 735 (5th Cir. 1965), cert. denied, 383 U.S. 958 (1966). In Thaggard, the Fifth Circuit, relying upon this Court's decision in United States v. Turley, 352 U.S. 407, 417 (1957), held that Section 2113(b) embraces "all felonious takings * * * with intent to deprive the owner of the rights and benefits of ownership regardless of whether or not the theft constitutes common law larceny" (Pet. App. C 15226, quoting 354 F.2d at 737).

Four judges dissented from this aspect of the en banc decision. The dissent expressed some doubt that the evidence was sufficient to support a finding that petitioner had acquired property from the bank by false pretenses (Pet. App. C 15228 n.1). But assuming that the evidence was sufficient, the dissent disagreed with the majority's conclusion that theft by false pretenses is within the reach of 18 U.S.C. 2113(b) (Pet. App. C 15228-15231). The dissent was persuaded by the analysis of the statute and its legislative history by the Ninth Circuit to reach a contrary conclusion in LeMasters v. United States, 378 F.2d 262, 267-268 (9th Cir. 1967). The dissent also cited the decision in United States v. Peroni, 655 F.2d 707, 710-711 (6th Cir. 1981), which followed LeMasters, and this Court's decision in Jerome v. United States, 318 U.S. 101, 105-106 (1943).

Accordingly, the dissent would have held that petitioner's conduct did not constitute a violation of 18 U.S.C. 2113(b).

## DISCUSSION

This case presents an issue of statutory construction on which there is a multi-circuit conflict. Accordingly, as indicated below, we do not oppose grant of the petition. While there is a need to resolve the conflict, we cannot say that the issue is one that is independently of great moment. We have therefore dealt with the issue in considerable detail in this Memorandum, in order to facilitate the Court's ability to decide the case without plenary briefing and argument, should it be disposed to do so.

Petitioner contends (Pet. 2-4) that 18 U.S.C. 2113(b) 1/ does not prohibit theft of property by false pretenses. 2/ The crime of false pretenses traditionally was distinguished from larceny by the fact that the latter required a trespassory or nonconsensual acquisition of the property from another, while in false pretenses the property and title thereto were acquired with the consent of the other party, albeit a consent procured by false or fraudulent representations. See W. La Fave and A. Scott, Jr., Criminal Law 618, 622, 655 (1972); J. Miller, Criminal Law 340-341, 348-382, 390 (1934). If the distinction

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1/ 18 U.S.C. 2113(b) provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.

2/ Petitions for a writ of certiorari raising the same issue in cases from other circuits also are pending before this Court. See Brown v. United States, No. 82-5201, and Shoels v. United States, No. 82-5550.

were followed in this case, petitioner's conduct would constitute false pretenses, not larceny, at least as larceny was defined at common law, because petitioner's withdrawal of the money from his account was with the consent of the bank, albeit a consent procured by his fraudulent conduct.

1. Section 2113(b) provides that "[w]hoever takes and carries away, with intent to steal or purloin," any money or property of value exceeding $100, belonging to or in the possession of a federally chartered or insured bank or other financial institution, shall be fined not more than $5,000 or imprisoned not more than 10 years, or both. Petitioner's conduct in this case certainly falls within the literal terms of this language. When petitioner withdrew the $10,000 plus interest from his account, he can be said to have "taken" the money from the teller who paid the money over to him; when petitioner left the bank, he "carried away" the money; and it seems clear that petitioner did these acts "with intent to steal or purloin" the money, in the sense that he intended to deprive the bank or the true owner of the use or benefit of the funds.

The Eleventh Circuit in this case agreed that the quoted language prohibits the obtaining of property by false pretenses, not merely by larceny, and that the language therefore applied to petitioner's conduct. In so holding, the court reaffirmed the Fifth Circuit's prior conclusion to the same effect in Thaggard v. United States, supra, where the court stated that "the term 'steal,' as used in 18 U.S.C. 2113(b), embraces 'all felonious takings * * * with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft

constitutes common-law larceny'" (Pet. App. C 15226, quoting 354 F.2d at 737).

In Thaggard, the Fifth Circuit in turn had relied upon this Court's decision in United States v. Turley, 352 U.S. 407 (1957). Turley involved a construction of the Dyer Act, 18 U.S.C. 2312, which provides criminal sanctions for "[w]hoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen * * *." The defendant in Turley argued that the Dyer Act's prohibition against transportation of "stolen" vehicles was limited to vehicles that had been wrongfully acquired by larceny, not by embezzlement or other means of theft. This Court disagreed. The Court observed that where a federal criminal statute uses a common law term without otherwise defining it, the practice is to give the term its common law meaning. But the Court found that the term "stolen" or "stealing" had no accepted common law meaning and was never equated with larceny, noting that the term was commonly defined to include a broad range of thefts, including larceny, embezzlement, and false pretenses. 352 U.S. at 411-412.

The Court in Turley also found this interpretation supported by the legislative history of the Dyer Act and by the Congressional purpose to utilize the federal government's jurisdiction over interstate commerce to prevent the widespread movement of wrongfully taken automobiles, and thereby to furnish federal assistance in an area with which the states could not fully deal. 352 U.S. at 413-417. Against this background, the Court held that the Dyer Act required an interpretation of the term "stolen" that was not limited to situations considered at common law to be larceny, but rather "includes all felonious

takings with intent to deprive the owner of the rights and benefits of ownershp" (352 U.S. at 417).

In Thaggard, the Fifth Circuit relied upon this conclusion in Turley regarding the breadth of the term "stolen" in the Dyer Act and held that the term "steal" used in 18 U.S.C. 2113(b), the bank theft statute at issue here, likewise should be read to encompass more than larceny. In so doing, the Fifth Circuit rejected the Fourth Circuit's contrary dictum in United States v. Rogers, 289 F.2d 433, 437 (4th Cir. 1961), where that court accepted the premise that Section 2113(b) reaches only the offense of larceny as that crime had been defined at common law. 3 /

The majority of the other courts of appeals that have considered the question have reached the same conclusion regarding the scope of Section 2113(b), likewise finding on the basis of Turley and similar lower court decisions that the word "steal" in that Section has a meaning broader than common law larceny and embraces theft offenses generally. See, e.g., United States v. Pistel, 460 F.2d 157, 162-163 (2d Cir. 1972) 4 /; United States v. Guiffre, 526 F.2d 126, 127-128 (7th Cir.), cert.

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3 / The pertinent language in Rogers was dictum because the court of appeals held that the conduct there in issue, whereby the defendant took advantage of a unilateral mistake by the bank to obtain the money, constituted larceny at common law in any event. 289 F.2d at 437-439. The contrary language in Thaggard actually also was dictum, because the case had been tried under a theory that required the jury to find the defendant guilty of the crime of larceny, not false pretenses. 354 F.2d at 737-738. Moreover, as pointed out in the government's brief in opposition to the certiorari petition in Thaggard, the conduct involved, like that in Rogers, constituted larceny at common law because it involved a unilateral mistake. Br. in Opp., No. 990, 1965 Term at 4-5 & n.3. The Fifth Circuit followed Thaggard in Williams v. United States, 402 F.2d 259 (1968), without further discussion.

4 / Followed in United States v. Tavoularis, 515 F.2d 1070, 1074 n.7 (2d Cir. 1975).

denied, 439 U.S. 833 (1976) 5 /; United States v. Shoels, No. 81-1748 (10th Cir. Aug. 11, 1982), slip op. 4-9, petition for cert. pending, No. 82-5550 (filed October 8, 1982); United States v. Simmons, 679 F.2d 1042, 1045-1046 (3d Cir. 1982), petition for cert. pending sub nom. Brown v. United States, No. 82-5201 (filed Aug. 7, 1982). 6 / In addition, the Third Circuit, after a review of the legislative history of the 1937 statute in which the present Section 2113(b) was enacted and of subsequent amendments to the Bank Robbery Act, concluded that the intent of Congress underlying the statute extended, at least in part, to protecting the federal goverment's financial interest in the institutions protected by the statute. See 679 F.2d at 1046-1048.

Aside from this precedent supporting a broad interpretation of Section 2113(b), it must be stressed that a construction of Section 2113(b) that limits its scope to larceny generally as understood at common law would perpetuate in this setting the technical and long-discredited distinctions between various types of theft offenses as they existed in years past. One such distinction that may be especially anomalous in the context of bank theft is that between larceny by trick, in which the thief fraudulently induces the owner to part with possession of the property, and false pretenses, in which the thief fraudulently induces the owner to part with title to the property. The former

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5 / As pointed out in the government's brief in opposition to the petition in Guiffre, the conduct there in issue constituted larceny at common law, and the question whether Section 2113(b) applied to conduct other than larceny therefore was not directly raised. Br. in Opp., No. 77-1778, 1978 Term, at 2-4.

6 / In United States v. Johnson, 575 F.2d 678, 679-680 (8th Cir. 1978), the Eighth Circuit expressed doubt that Section 2113(b) is limited to common law larceny, but found it unnecessary to resolve the issue.

was regarded as larceny at common law, but the latter was not. La Fave & Scott, supra, § 91, at 67. If Section 2113(b) were interpreted to embody the offense of larceny as defined at common law, larceny by trick of more than $100 from a federally chartered or insured bank would be a federal felony, yet the obtaining of title to the same amount of money by false pretenses -- petitioner's conduct here -- would not even be an offense under that Section. Not only might such a result appear anomalous with respect to the culpability of the wrongdoer; it also would leave a gap of uncertain dimensions in federal protection for federally chartered or insured financial institutions. 7 /

Such technical distinctions between various types of theft offenses were subject to substantial criticism in the 1930's, when the present Section 2113(b) was enacted. See, e.g., Miller, Criminal Law 374 (1934), quoting Note, 2 Calif. L. Rev. 334, 335 (1914):

> The boundary line separating [common law larceny, embezzlement, and false pretenses] is often too difficult to ascertain in advance * * *. The result is that when the District Attorney has charged one of these crimes, the defendant often secures an acquittal by proving he is guilty of one of the others. There may be some who believe the subtle distinctions in these crimes inherent in the nature of things, but it is submitted that their existence is entirely due to accidental, historical causes, and their perpetuation is a disgrace.

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7 / Embezzlement and misapplication of funds by officers and employees of banks are separately prohibited by 18 U.S.C. 656, and the acquisition of property by fraudulent means would be barred in at least some circumstances by 18 U.S.C. 1014, considered recently by this Court in Williams v. United States, No. 80-2116 (June 29, 1982). See, e.g., United States v. Pinto, 646 F.2d 833, 838 (2d Cir. 1980), cert. denied, No. 81-2088 (Oct. 4, 1982).

See also Morissette v. United States, 342 U.S. 246, 271 (1952); American Law Institute, Model Penal Code, § 223.1(1) (Proposed Offical Draft 1962); National Commission on Reform of Federal Criminal Laws, Final Report § 1731(1) (1971). Indeed, for this very reason, a number of states had amended their theft statutes by the 1930's and redefined "larceny" as a generic offense that included obtaining of property by false pretenses. 8 / Similarly, Congress enacted a theft statute in 1940 relating to investment companies, which, although entitled "Larceny and Embezzlement," applied broadly to whoever "steals, unlawfully converts * * * or embezzles" money or property. 15 U.S.C. 80a-36, Act of Aug. 17, 1940, Section 37, 54 Stat. 841. Thus, by the 1930's, the term "larceny" was often defined by statute to embrace offenses other than the offense of larceny as known at common law. Indeed, in Prince v. United States, 352 U.S. 322, 324 n.2 (1951), this Court stated that its use of the terms "robbery" and "larceny" in its opinion concerning Section 2113 "refer not to the common-law crimes, but rather to the analogous offenses in the Bank Robbery Act."

2. Several other courts of appeals, however, have reached a contrary conclusion. In addition to the dictum in the Fourth Circuit's opinion in United States v. Rogers, supra, the Sixth and Ninth Circuits have held that Section 2113(b) is limited to the offense of larceny generally as understood at common law. United States v. Peroni, 655 F.2d 707, 709-711 (6th Cir. 1981);

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8 / See, e.g., Gilbert's Annotated Criminal Code and Penal Law of New York § 1290 (1937); Mass. Gen. Laws, Ch. 266, § 30 (1932); Mason's Minn. Statutes §10358 (1927); Remington's Rev. Stats. of Wash., Tit. 14, ch. 9, § 2601 (1932); R. I. Gen. Laws, Tit. 39, ch. 397, § 15 (1923); W. Va. Code, ch. 61, § 5965 (1932); Code of Va., Tit. 40, Ch. 179, § 4459 (1918).

LeMasters v. United States, 378 F.2d 262, 263-268 (9th Cir. 1967); Bennett v. United States, 399 F.2d 740, 744 (9th Cir. 1968); United States v. Sellers, 670 F.2d 853, 854 (9th Cir. 1982); but cf. United States v. Maloney, 607 F.2d 222, 230 & n.12 (9th Cir. 1979). We must acknowledge, moreover, that there are a number of factors that point to a narrower interpretation of Section 2113(b) than would appear to be called for by its plain language. Some of these factors have not been addressed or fully discussed by the courts that have held that Section 2113(b) prohibits the obtaining of money by false pretenses, and we therefore feel it appropriate to identify them here.

a. As we have pointed out above (see page 5, supra), the fraudulent acquisition of money involved in this case falls within the literal terms of Section 2113(b), which applies to "[w]hoever takes and carries away, with intent to steal or purloin," property belonging to or in the custody of a covered bank. But, as the Ninth Circuit pointed out in LeMasters v. United States, supra, 378 F.2d at 264, the quoted language actually employs terms that are similar to those used in the traditional formulation of common law larceny. Specifically, at common law, the criminal act of larceny was defined as the felonious or trespassory "taking and carrying away" of the property of another. See, e.g., La Fave & Scott, supra, § 85, at

622; 9 / id. § 86, at 631-633. In contrast, where the crime of false pretenses is concerned -- a crime in which the owner intends to part with the property and therefore consents to its acquisition by the thief -- the term "obtain," rather than "take and carry away," often has been used in describing the criminal act. See, e.g., 18 U.S.C. 1025; La Fave & Scott, supra, § 90, at 655; Miller, supra, § 118, at 382.

The phrase following the "takes and carries away" element of the offense described in Section 2113(b) -- "with intent to steal of purloin" -- describes the wrongful intent with which the criminal act must be performed in order for the actor to be guilty of an offense. Cf. United States v. Bailey, 444 U.S. 392, 402 (1980). The phrase "with intent to steal" has been used by some commentators in describing the scienter element of the traditional offense of larceny -- that the act be done with the intent to deprive the owner of the property permanently or for an unreasonably prolonged period of time. See, e.g., La Fave & Scott, supra, § 85, at 622 (quoted in note 9, supra); id. § 86, at 637-644; Miller, supra, § 114, at 365. Moreover, in the brief for the United States in Jerome v. United States, 318 U.S. 101 (1943), the government, while arguing for a broad reading of the bank burglary provision in what is now 18 U.S.C. 2113(a) that

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9 / La Fave & Scott state, at the page cited:

> Larceny at common law may be defined as the (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it.

See also United States v. Turley, supra, 352 U.S. at 412, quoting Blackstone, IV Commentaries 229; 2 Burdick, The Law of Crime, § 496 (1946); Miller, Criminal Law, §190 (1934); Webster's New International Dictionary (2d ed. 1958); Blacks Law Dictionary (5th ed. 1978); United States v. Patton, 120 F.2d 73, 75 (3d Cir. 1941). Cf. Jolly v. United States, 170 U.S. 402, 404-405 (1898).

would have prohibited an entry into a bank to engage in fraudulent conduct defined as a felony under state law, described what is now Section 2113(b) as containing a definition of the offense of "larceny" that embodies the "common law concepts of * * * a taking and carrying away with intent to steal." 10 / See also Morissette v. United States, supra, 342 U.S. at 266 n.28 (describing comparable language in 18 U.S.C. (1940 ed.) 82); id. at 267-268 n.28 (comparing 18 U.S.C. (1940 ed.) 99 and 100). But cf. United States v. Amarata, 193 F. Supp. 624, 626 (D. Mass. 1961).

The fact that the word "steal" appears in the portion of Section 2113(b) that defines the mental element of the offense, rather than that defining the criminal act itself, might thus distinguish this case from United States v. Turley, supra. In Turley, the Court discussed the term "stolen" as used in the Dyer Act with reference to vehicles, and the generic offense of "stealing" to which the word "stolen" in the Dyer Act had reference. 352 U.S. at 411-413. In that setting, the terms "stolen" and "stealing" referred largely if not exclusively to the criminal act, not the criminal intent, and the word was read to include all types of theft. In Section 2113(b), however, the criminal act is defined in terms of whoever "takes and carries away," not whoever "steals." The analysis of the term "stealing" in Turley therefore may be thought not to resolve directly the issue presented here.

b. The legislative history of Section 2113, although recognized by this Court as "meager" (Jerome v. United States, supra, 318 U.S. at 105), also has led two courts of appeals to

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10 / See Brief for the United States, No. 325, 1942 Term, at 27.

conclude that Congress intended Subsection (b) of that Section to apply only to larceny as that term has been commonly understood. See United States v. Feroni, supra; LeMasters v. United States, supra. That legislative history is, in turn, discussed in this Court's opinion in Jerome, 318 U.S. at 102-104.

Prior to 1934, banks organized under federal law were protected against embezzlement (R.S. 5209), but not robbery, burglary, and larceny, which were punishable only under state law. By 1934, concern was expressed about the activities of gangsters who operated habitually from one state to another in robbing banks, and about the fact that state authorities frequently were unable to cope with the problem. Jerome, 318 U.S. at 102, citing H.R. Rep. No. 1461, 73d Cong., 2d Sess. 2 (1934); see also S. Rep. No. 537, 73d Cong., 2d Sess. 1 (1934). The Attorney General proposed legislation to deal with this problem. S. 2841, 73d Cong., 2d Sess. This bill prohibited robbery (§ 4), burglary (defined as the breaking into a bank with intent to commit an offense defined by the bank-robbery act or to commit any felony under federal or state law) (§ 3), and theft (§ 2). The latter section provided criminal sanctions for whoever "takes and carries away" property belonging to or in the possession of a bank "(1) without the consent of such bank, or (2) with the consent of such bank, obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation." This latter clause plainly would have applied to petitioner's conduct in this case. The 1934 bill passed the Senate in this form. However, the House Judiciary Committee

struck Sections 2 and 3 without explanation, 11 / and the bill was enacted without them, applying principally to robbery. Jerome, 318 U.S. at 103.

In 1937, the Attorney General recommended amendment of the bank robbery statute "to include larceny and burglary" of banks. Jerome, 318 U.S. at 103, quoting H.R. Rep. No. 737, 75th Cong., 1st Sess. 1 (1937). The Attorney General explained that the limitation of the statute to robbery had produced "some incongruous results" -- a "striking instance" of which was a situation in which a man had managed to gain possession of a large sum of money in the momentary absence of a bank employee, without displaying force or violence or putting anyone in fear, as required for the offense of robbery. H.R. Rep. No. 732, supra, at 1-2. The example cited by the Attorney General would have constituted larceny at common law because the property was taken without the consent of the bank.

The 1937 bill, unlike the Attorney General's 1934 proposal, did not specifically address both consensual and nonconsensual takings. The Attorney General's bill was introduced by Representative Summers (H.R. 5900, 75th Cong., 1st Sess.; 81 Cong. Rec. 2731), and was enacted in essentially the same form as

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11 / Both the petitioner and the government in Jerome suggested that deletion of these provisions may have been attributable to Representative Sumners, the Chairman of the House Judiciary Committee, who, it was said, "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative." A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws, 1 Law & Contemp. Probs. 445, 448-449 (1934), quoted in Brief for the United States, at 18 & n.16, and Brief for Petitioner, at 19-20.

introduced. 12 / The Act itself was entitled an act "to amend the bank-robbery statute to include burglary and larceny" (ch. 774, 50 Stat. 749), and the Committee Reports describe the bill in the same way, 13 / thereby indicating that Congress apparently understood what is now Section 2113(b) to state an offense that could appropriately be termed "larceny." This Court in Jerome likewise referred to what is now Section 2113(b) as defining the offense of "larceny" (see 318 U.S. at 103, 105, 106), a term that in Prince the Court employed to mean not "common law" larceny but rather the "analogous offense[ ]" in Section 2113. 352 U.S. at 324 n.2; see also id. at 326 & n.5, 327 & nn.6 & 7, 328-329 n.10 (referring to the offense as "larceny").

c. Although Section 2113(b) does not expressly refer to false pretenses, as did the Attorney General's 1934 proposal and the contemporary state statutes cited above that had expanded the definition of larceny beyond its common law scope (see pages 9-10 & n.8, supra), the mere use of the word "larceny" in the title of the Act and committee reports does not necessarily establish an intent to exclude theft by false pretenses. In the 1934 bill proposed by the Attorney General, for example, the theft section provided that whoever "takes and carries away" property with or without the consent of the bank was guilty of an offense. The

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12 / The provision relevant here was amended on the House floor to provide misdemeanor sanctions for cases involving less than $50 and felony sanctions for cases involving $50 or more. 81 Cong. Rec. 5376-5377. When the $50 amount was raised to $100 in 1948, the dollar figure was described as "the dividing line between petit and grand larceny." H.R. Rep. No. 304, 80th Cong., 1st Sess. A-135 (1947). See also Prince v. United States, 352 U.S. 322, 328-329 n.10 (1957); Brief for the United States in Jerome, at 23.

13 / H.R. Rep. No. 732, supra, at 1; S. Rep. No. 1259, 75th Cong., 1st Sess. 1 (1937).

use of the identical phrase "takes and carries away" in what was referred to as the "larceny" provision of the bill proposed by the Attorney General and enacted by Congress in 1937 therefore likewise could have been intended to incorporate both consensual and nonconsensual takings and therefore to apply to the theft by false pretenses involved here. In this regard, this Court in Jerome referred to the theft provision of the 1934 bill as "dealing with larceny" (318 U.S. at 103), despite the language covering the taking of property with the fraudulently obtained consent of the bank, and the Court elsewhere referred to this provision of the 1934 bill as having "defined larceny to include larceny by trick or fraud" (318 U.S. at 105). Against this background, it could be concluded that Congress used the phrase "takes and carries away" in what is now Section 2113(b) and attached the label "larceny" to that provision without intending to confine the statute to larceny as understood at common law.

There are, however, several factors that weigh against attributing to Congress on this basis an intent to bring false pretenses within the reach of Section 2113(b). First is the enactment of what is now 18 U.S.C. 1025 in 1939, two years after Section 2113(b) was enacted. Act of Aug. 5, 1939, ch. 434, 53 Stat. 1205. 14 / Section 1025 prohibits the obtaining of property by false pretenses upon any waters or vessel within the special maritime and territorial jurisdiction of the United

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14 / This enactment appears not to have been brought to the attention of any of the courts of appeals that have addressed this issue.

States. 15 / This provision was enacted in response to the recommendation of the Attorney General. He stated in a letter to Congress that existing federal statutes applicable in that special federal jurisdiction -- including, he stated, the statute prohibiting "larceny," 18 U.S.C. (1940 ed.) 466 (the present 18 U.S.C. 661) -- did not reach "card sharping" offenses on the high seas. Thus, he explained, he was recommending the enactment of legislation to prohibit obtaining money by false pretenses on the high seas, which would include the activities of card sharps within its scope. See S. Rep. No 446, 76th Cong., 1st Sess. 1 (1939).

The general federal larceny statute that was among the criminal statutes cited by the Attorney General as not covering the conduct in question was derived from a 1790 statute that was and is written in terms identical to Section 2113(b), applying to whoever "takes and carries away [property], with intent to steal or purloin." 16 / The enactment of Section 1025 in 1939 therefore might suggest that neither Congress nor the Attorney General in 1937 understood the identical language in Section 2113(b) (or the reference to that language as "larceny") to include false pretenses. But cf. United States v. Turley, supra, 352 U.S. at 415 n.14, in which the Court declined to attach

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15 / The statute may have been limited to vessels within the special maritime and territorial jurisdiction of the United States (which excludes areas within the jurisdiction of a State, see 18 U.S.C. 7(1)) because the offense of false pretenses on federal land within the jurisdiction of a State could be prosecuted pursuant to the Assimilative Crimes Act, 18 U.S.C. 13.

16 / The present 18 U.S.C. 661 is descended from the Act of Apr. 30, 1790, ch. 8, 1 Stat. 112, 116. It has been referred to as a "larceny" statute (Williams v. United States, 327 U.S. 711, 723 n.26 (1946); United States v. Sharpnack, 355 U.S. 286, 289 n.5 (1958)), although it has been held not to be confined to the contours of that offense as defined at common law with respect to the element of intent to deprive the owner of the property permanently. United States v. Gristeau, 611 F.2d 181, 183 (7th Cir. 1979); United States v. Maloney, 607 F.2d 222, 225-226 (9th Cir. 1979); United States v. Henry, 447 F.2d 283, 285 (3d Cir. 1971).

weight to Congress' failure to enact legislation requested by the Attorney General to clarify that the Dyer Act applied to transportation of "stolen" vehicles, whether or not acquired by common law larceny. 17 /

In addition, although the actual holding in Jerome concerns the scope of the bank burglary provision now contained, as amended, 18 / in the second paragraph of Section 2113(a), this Court took a view of the Bank Robbery Act and its legislative history in Jerome that is consistent with a narrow interpretation of Section 2113(b). The issue directly involved in Jerome was whether the prohibition in the bank burglary provision, which as originally enacted prohibited entering a bank with the intent to commit "any felony or larceny," applied to an entry to commit a felony as defined under state law. See 308 U.S. at 101-102. Jerome, a captain in the Army, had forged the signature of another officer as a co-signer of a note in order to obtain a $400 loan, on which he subsequently defaulted. The uttering of a forged promissory note was a felony under state law, and Jerome was charged with the federal offense of entering the bank to commit that state felony.

This Court held that the term "any felony" in the bank burglary provision did not include state felonies and included only federal felonies affecting banks. 352 U.S. at 107-108. In reaching this conclusion, the Court observed that the bill

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17 / In proposing the false pretenses on the high seas bill, the Attorney General explained that the Department's draft bill was patterned after the parallel provision of the District of Columbia Code. S. Rep. No. 466, supra, at 1. That provision, the present D.C. Code 22-1301, was amended by Congress in 1937, just two weeks before Section 2113(b) was enacted, to raise the dividing line between misdemeanor and felony false pretenses from $35 to $50. Act of Aug. 12, 1937, ch. 599, 50 Stat. 628. In that same Act, Congress amended the larceny provisions of the D.C. Code, the present Sections 22-2201 and 2202 (referring to "[w]hoever shall feloniously take and carry away"), to provide a parallel division between grand and petit larceny.

18 / See note 22, infra.

proposed by the Attorney General in 1934 would have expressly prohibited entering a bank to commit a felony under federal or state law and also "defined larceny to include larceny by trick or fraud" (318 U.S. at 105) -- a reference to the theft offense described in Section 2 of the Attorney General's 1934 proposal, quoted at page 14, supra. But, the Court noted, these proposals were not in the end incorporated in the 1934 Act, and the 1937 bill "did not renew the earlier proposals to include them" (318 U.S. at 105) but instead took a "selective" approach (id. at 107). 19 / The Court found it "difficult to conclude" that Congress, having rejected express language in the bank burglary provision in 1934 covering entries to commit state felonies, "reversed itself in 1937, and, through the phrase 'any felony or larceny' adopted the penal provisions of forty eight states with respect to acts committed in national or insured banks" (id. at 105-106). The Court then continued: "It is likewise difficult to believe that Congress, through the same clause, adopted by indirection much of the fraud provision which it rejected in

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19 / See also Prince v. United States, supra, 352 U.S. at 327 ("The only factor stressed by the Attorney General in his letter to Congress [in 1937] was the possibility that a thief might not commit all the elements of the offense of robbery").

1934. Cf. United States v. Patton, 120 F.2d 73" (318 U.S. at 106). 20 /.

The last-quoted passage indicates that the Court did not understand the phrase "any felony or larceny" in the burglary provision of the statute to encompass entry to commit the fraud or false pretenses offenses proposed in 1934 but not included in the 1937 Act. The Court twice stated in Jerome that the term "larceny" as used in this phrase "any felony or larceny" was defined elsewhere in the statute (318 U.S. at 105, 106) -- a reference to the "takes and carries away, with intent to steal or purloin" language now contained in Section 2113(b). 21 / If, as the Court indicated, fraud or false pretenses was not covered by

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20 / In United States v. Patton, 120 F.2d 73 (3d Cir. 1941), cited by the Court in the passage quoted, the defendant was employed as a clerk for a company that had a petty cash account at a bank, and he was authorized to make deposits and (with a co-signature of a fellow employee) to make withdrawals. The company drew a check on another bank payable to the petty cash account, and the defendant altered the amount from $1100 to $11,000. He then drew a check for approximately $11,000, forged the co-signature, and entered the bank and cashed the check therein. The defendant was indicted for (1) entering a national bank with intent to commit larceny, in violation of what is now 18 U.S.C. 2113(a), and (2) taking and carrying away with intent to steal or purloin money in excess of $50, in violation of what is now 18 U.S.C. 2113(b). 120 F.2d at 74. The government conceded that the taking and carrying away charged as offense (2) was the equivalent of the larceny mentioned in the unlawful entry charged in offense (1). Id. at 75. The Third Circuit reversed both convictions, concluding that there was no trespassory taking as required for the offense of larceny, but rather a turning over of the money with the fraudulently obtained consent of the bank (120 F.2d at 75-76) -- i.e., false pretenses -- an offense that the Third Circuit held was not covered by the statute.

In United States v. Pinto, 646 F.2d 833, 836 (3d Cir. 1981), the Third Circuit read Patton as involving only the bank burglary provision now contained in Section 2113(a). See also United States v. Handler, 142 F.2d 351, 353 (2d Cir. 1944). Subsequently, in United States v. Simmons, supra, the Third Circuit concluded that Section 2113(b) does apply to the offense of false pretenses, but without citing Patton.

21 / The government's brief in Jerome (at 27) likewise took the position that the "larceny" mentioned in the burglary prohibition was defined by what is now Section 2113(b). See also United States v. Patton, supra, 120 F.2d at 75.

the phrase "any felony or larceny" in the burglary provision, then, under the Court's reasoning, fraud or false pretenses likewise could be thought not to be covered by what the Court regarded as the relevant definition of the term "larceny" -- the present Section 2113(b), under which petitioner was convicted.

For the reasons just given, affirmance by this Court of the judgment below might require this Court to reconsider the language and to some extent the analysis of the decision in Jerome, although not the actual holding of that case regarding the scope of the bank burglary provision. 22 /

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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22 / The specific holding in Jerome was incorporated by Congress in the 1948 revision of Title 18, when Congress changed the relevant language in what is now Section 2113(a) from "any felony or larceny" to read any felony affecting the bank "in violation of any statute of the United States, or any larceny." See H.R. Rep. No. 304, 80th Cong., 1st Sess. A-135 (1947).